PROOF OF PAYMENT AND EVIDENTIARY PROBLEMS

A COMPARISON OF TODAY'S PAYMENT SYSTEM TO THE COMPUTER PAYMENT SYSTEM OF THE FUTURE

Working Paper #7

Professor A. W. Bryant

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This background paper is one of a series which has been developed in connection with a research project directed by Professor Richard H. McLaren. It is directed at identifying specific issues within a designated topic. The research project was designed to identify the "Policy and Legislative Responses to Electronic Funds Transfer" from a provincial perspective.

I N D E X

PART II

PROLOGUE

Purpose and Scope of This Study

This paper deals with the evidentiary problems associated with a computerized payments system. It is a general analysis of whether or not computer maintained records are admissible as proof of payment. To this end the common law and the Evidence Acts of Ontario and Canada are examined. Where it was deemed helpful, reference has been made to the legislative and judicial experience of other jurisdictions.

This scope placed limits on the issues which could be examined and also on the materials which could be canvassed. Accordingly every Ontario statute with some evidentiary provision ancillary to its main object was not examined. Instead the analysis concentrated on those statutes which deal primarily with evidence. Likewise no reference was made to the impact of a computerized payments system on the criminal law or the administration of criminal justice. Finally this limit precluded an in depth analysis of the case law on the American statutes upon which some sections of The Ontario Evidence Act were modelled, and the constitutional issue regarding legislation with respect to the rules of evidence.

It is submitted that although an abstract analysis of proof in the computer age would have some value, the nature and extent of the problems cannot be fully appreciated without a framework from which an analysis can be made. Such a framework is to be found in the principles of proof now governing the litigation process. Accordingly the study is divided into two main parts. Part I deals with proof of payment in today's commercial and consumer society while Part II discusses some of the evidentiary problems of proof of payment in a computerized payments system.[1]

INTRODUCTION

A payment system, for the purposes of this paper, is a system whereby credits and debits arising out of commercial and consumer transactions are made in discharge of a debt for goods received or services rendered. Some disputes which arise between commercial enterprises, or between merchants and consumers are over the fact of payment itself, the amount of the payment or even the lack of payment. The resolution of such disputes may come about in many ways, some formally as in court action or arbitration; some informally between the principals themselves. The rules of evidence, generally speaking, play an ascending role of importance depending on the formality of the forum in which the dispute is resolved.[2]

Most modern methods of legally resolving commercial disputes depend on proof. Resolution is effected when one party proves his position to the satisfaction of the other or some adjudicative body. In comparison, the resolution of a labour relations dispute can be the result of more forceful efforts such as strikes, lockouts or back to work legislation.

When commerce was in its infancy, and the payments system was barter, the disputes were probably not over the fact of payment but over the amount or value of the things to be exchanged. Still, a person might have been called upon to prove payment to defend an allegation of theft. The manner of proof might have been by feud, ordeal, or compurgation, but nevertheless proof was the object of the exercise.

The rule that proof is required to resolve a dispute still applies today when the payments system encompasses in addition to barter, cash, credit cards, cheques, bills of exchange, and other negotiable instruments. In the future, there may well be a computerized payments system replacing some or all of the present methods of exchange. Proof will still be required to resolve disputes over payment, but the manner of proof will

undoubtedly be different than that which is currently employed, as the types of evidence available to prove payment will necessarily be different. This paper is concerned with proof of payment in a judicial forum.

Evidence Generally

Proof in a judicial forum flows from evidence. Cross, in his text on Evidence states:

> "The evidence of a fact is that which tends to prove it - something which may satisfy an enquirer of the fact's existence. Courts of law usually have to find that certain facts exist before pronouncing on the rights, duties and liabilities of the parties, and such evidence as they will receive in furtherance of this task is described as judicial evidence.[3] ...Judicial evidence consists of the testimony, hearsay statements, documents, things and facts in issue in a given case."[4]

I do not think it is inaccurate to say that the most common form of evidence, and that preferred by the courts is testimony given by witnesses who have personal knowledge of the facts in issue. It must be remembered that in an age when machines communicate with men, most evidence, of whatever kind, must still be given through a human witness.[5]

The theoretical basis for this preference fills dozens of volumes on the subject matter of evidence. It can generally be stated that in an adversary proceeding, such evidence is preferred because the witness is under oath and his veracity, memory, ability to communicate and perception can be tested by cross-examination.

This preference finds expression in the hearsay rule itself which, initially at least, renders certain proposed evidence inadmissible.[6] There are many judicial and textbook definitions of the hearsay rule but the following definition of hearsay

by the Privy Council[7] which has been adopted in Ontario[8] will be used:

> "Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."

Private documents, depending on the purpose for which they are introduced may be hearsay. If the purpose is to prove the existence of the very document it is real evidence; if it is tendered to prove the contents it is inadmissible as hearsay. Certain classifications of documents became admissible as testimonial evidence as exceptions to the hearsay rule and this exception was later enlarged by statutory provisions.

In the present payments system paper documents are commonly employed to initiate and record commercial and consumer transactions and to discharge the resulting obligations. These same documents are regularly tendered as evidence in dispute resolutions in the judicial forum. The following list, which is not intended to be exhaustive includes some of them.

1. cheques and other bills of exchange
2. invoices and delivery slips
3. customer account ledgers
4. bills of account
5. purchase orders
6. receipts and cash register tapes
7. deposit slips
8. debit and credit memos

In an electronic payments system some or all of these will become rare or extinct as commercial and financial institutions reduce their paper bookkeeping in an effort to minimize cost and maximize efficiency. This, of course, will depend on the method

of transacting the sale and the type of computer records which are made and kept in respect of commercial or consumer transactions. For example, in an electronic payments system, a mortgage payment may be made directly by the mortgagor to the mortgagee by electronically debiting the mortgagor's bank account and crediting the institution's account. If there are similar facilities for the sale of goods then some of our existing consumer and commercial documents will be dispensed with. For example, if there is a computer terminal in the vendor's place of business, the vendor's records, although serving some of the same functions as today's paper documents, will be in a different form while other documents such as a cheque will be non-existent. In some situations, such as a telephone initiated electronic funds transfer, the purchaser may not receive any paper documents at the time of the transaction. Even though he may later receive some form of record from his bank, and may have his own records of payment, the purchaser may never get any document from the vendor which would amount to an admission of payment. These problems, as well as a brief description of the nature and type of records of the future will be more fully discussed in Part II of this paper.

PART I

PROOF IN THE PRESENT PAYMENT SYSTEM

An analysis of the existing payment system is necessary in order to evaluate whether or not the rules of evidence as they now exist are compatible with proof of payment in a computerized payment system.

Assume for the purpose of this analysis a very simple hypothetical sales transaction.

A commercial customer requests certain goods in a written purchase order mailed to a supplier. The goods are delivered to the customer with an invoice and delivery slip. The latter is signed by the customer and returned to the supplier by his employee. At the end of the month an account is sent to the customer who writes a cheque on his bank account and sends it to the supplier. However, something goes wrong and the supplier's books indicate that the customer's account is unpaid. A conflict over the payment ensues and the parties are unable to resolve the dispute. The supplier instructs his solicitors to commence legal proceedings to collect the debt. Assume for the purpose of this problem that the solicitor sues by way of a generally endorsed writ.[9] This paper will now examine the various rules of court, common law and statutory law which will assist either party in the above hypothetical case. Variations and additional facts to the hypothetical will be made or added to demonstrate problems in the existing payment system.

EXAMINATION FOR DISCOVERY AND PRODUCTION OF DOCUMENTS

(a) Generally

Examinations for discovery and the production of documents are very important aspects of the litigation process and it is at this stage that the rules of evidence commence playing a major role in the resolution of disputes. The Rules of Practice[10] (Rules 326-352) govern discovery before trial and the production

of documents before and at trial. The purposes of these rules are as follows: (1) "to enable the examining party to know the case he has to meet; (2) ...procure admissions and thereby dispense with formal proof...; (3) procure admissions to destroy his opponent's case and (4) to facilitate settlement."[11] In Perini Ltd. v. Parking Authority of Toronto,[12] the Ontario Court of Appeal held that discovery should be full and complete and the production of documents relates to all aspects of the case of the opposite party. The court was of the opinion that the rules should be interpreted in a broad way.

Both parties in the hypothetical case would avail themselves of the opportunities to examine the opposite party and would serve the required notices for production of documents (production of documents generally, at discovery, and at trial). The documents required by the parties would include the invoice, the signed delivery slip, the cancelled cheque, account ledgers, bank statements, and the bank deposit book.

During the examination for discovery of the defendant he will admit ordering the goods, signing the delivery slip, produce the cancelled cheque allegedly endorsed and deposited by the plaintiff to his bank account, his bank statement showing a debit in the amount of the cheque and his accounts payable ledger card (if a commercial transaction) in the name of the plaintiff which will show a zero balance. During the examination for discovery of the plaintiff he will admit the endorsement of the cheque and a credit in the amount of the cheque in his bank deposit book and bank statement. However, his customer ledger card in the name of the defendant will show an outstanding balance for the goods purchased.

It is hoped that at this stage the plaintiff would discover the error and discontinue the action after rectifying the error with his bank or would do so after a pre-trial conference.[13] I think it is appropriate to comment on the substantial importance of documents in civil litigation and point out that some of the Rules of Practice are specifically drafted with this in mind.

Referring above to the purposes of discovery, it becomes readily apparent that the whole litigation process as we now know it, would be frustrated if the opposite party could not obtain inspection, production and discovery of documents as well as have the opportunity to authenticate documents and to obtain admissions with respect to them.

(b) Discovery and Production of Bank Records Prior to Trial

The question arises as to whether or not the parties could obtain inspection, production or discovery of the opposite party's bank records in the custody of their respective banks. Rule 349 of the Rules of Practice states as follows:

> "Where a document is in possession of a person not a party to the action and the production of such document at trial might be compelled, the court may at the instance of any party, on notice to such person and to the opposite party, direct the production and inspection thereof, and may give directions respecting the preparation of certified copy that may be used for all purposes in lieu of the original."[14]

The rule on its face would seem to indicate that bank records of a party may be the subject of production and inspection. The principles of Privacy, Secrecy and Compellability run counter to the theory of discovery and therefore must be discussed.

(i) Privilege

Prior to the passage of Section 29[15] of the Canada Evidence Act which specially deals with bank records, Section 46 of the old Bank Act[16] provided that:

> "The books, correspondence, and funds of the bank shall at all times be subject to the inspection of the directors; but no person who is not a director shall be allowed to inspect the account of any person dealing with the bank."

In the case of Re Chatham Banner Co., Bank of Montreal's Claim,[17] the liquidator of Chatham Banner in a winding-up proceedings was not at liberty to inspect the private account of the manager of the company by order of the Master. The liquidator claimed that

certain indebtedness to the Bank was actually advances to the manager for his own private purposes to the knowledge of the bank. The manager was not a party to the action and was not called as a witness in the proceedings. Street J. held that the section precluded shareholders from inspecting the accounts of the banking company but "it certainly cannot enable the bank to refuse to disclose its transactions with one of its customers, when the propriety of those transactions is in question in a court of law between the bank and another customer who attacks them, and shows good cause for requiring information he seeks."[18] The court then ordered the matter be referred back to the Master and stated that the liquidator was entitled to production, documents and explanatory information of the entries.

In Chatham Banner, the issue of discovery of bank records arose at the trial of an issue, however, the case was cited with approval by the Ontario Court of Appeal[19] for the proposition that the rule set out in S.46 of the Bank Act was not an absolute one. The issue in the subsequent case was whether it was proper for a bank to permit a third person to inspect their customer's account in connection with a possible assignment of the customer's indebtedness. The court held that it was proper because to strictly construe section 46, not even the bank's employee or the customer himself could inspect his account.

In an earlier decision by the Ontario Court of Appeal, Osler, J.A. held:

> "The evidence as to a customer's account is not privileged at common law, and the section does not appear to amount to more than a prohibition against the bank voluntarily permitting any examination of customers' accounts save by a director."[20]

The issue of privilege in this case again arose at the trial of an action but it is submitted that the principle is of general application and would apply to pre-trial procedures as well.[21] It is submitted that bank records per se are not privileged.

(ii) Secrecy

The decision by the English Court of Appeal in Tournier v. National Provincial and Union Bank of England[22] is the leading case on point. Paget's Law of Banking in reference to this case states that the duty to maintain secrecy is:

> "a legal one, arising out of contract, not merely a moral one. Breach of it...gives a claim for... damages.... It is, however, not an absolute duty, as has been contended, but qualified, being subject to reasonable, if not essential, exceptions."[23]

Banks, L.J. in Tournier states that the four qualifications are:

> "(1) Where disclosure is under compulsion by law;
> (2) Where there is a duty to the public to disclose;
> (3) Where the interests of the bank require disclosure;
> (4) Where the disclosure is made by the express or implied consent of the customer."[24]

An example of the first exception would be a special order under S.29(5) of the Canada Evidence Act or a search warrant issued under S.443 of the Criminal Code[25] with reference to S.29(7) of the federal Evidence Act. The second and third reasons are not relevant to this study (although the case of Ryan v. Montgomery[26] cited earlier may be an example of the third category). The fourth is self-explanatory.

(iii) Compellability

As stated above, the bank is under a qualified legal duty to maintain secrecy and their documents are not privileged at common law. The next question which arises is whether or not banking records can be inspected and certified copies made prior to trial of an issue. Bank records of a party or even a third party may be very important to an issue in a case. For example, if a party alleges a fraudulent transfer of money to a third party or if a very simple consumer payment is made by a money order, then the third party or the opposite party's bank records become very important.

In 1890, the English Court of Appeal in the case of Elder v. Carter Ex Parte Slide and Spur Gold Mining Company[27] judicially considered the scope of the then English equivalent to Rule 349 of the Rules of Practice. The mischief which the rule was meant to rectify was that there were difficulties in obtaining the attendance and production of documents at common law except on the trial of an action."[28] The Court rejected an interpretation in accordance with the literal words of the section and held that the rule was:

> "not intended to enact that at any stage of a proceeding a judge may make, subject to his discretion, an order on a third person for production of a document which belongs to the third person, unless the production of it at that moment is a thing to which the parties are entitled for the purposes of justice; and you are not entitled, for the purpose of justice at any moment during suit, simply because you are a litigant, to see what is in the possession of a third party and have production of it."[29]

Although the English position was not cited, the same reasoning was applied in Ontario in the case of McCurdy v. Oak Tire and Rubber Co.[30] The case is briefly reported without facts but the issue on appeal was an order by the Master under Rule 350 (now 349) requiring a non-party trust company to produce documents for inspection. Middleton J. held that Rule 350 "was intended to simplify the procuring of evidence, and to avoid the taking of a witness who is the custodian of documents to a trial, and was not intended to be a means of discovery from strangers to an action."[31] His Lordship did allow that bankers' books could be inspected before trial but unfortunately he did not specify under what circumstances such as inspection could be undertaken.

In two subsequently reported decisions,[32] Masters of the Supreme Court have followed McCurdy and held that neither a bank nor stockbrokers had to produce documents for inspection because

Rule 350 (now 349) was only intended to facilitate the proceedings at trial. Master Garrow stated that:

> "Before any order can be made under it, it must be made to appear that the stranger to the action has in his possession certain specific documents which the court would in all probability admit at trial as evidence in respect of some of the issues in the action."[33]

These earlier decisions must be viewed in light of the subsequent hospital record cases. Although the hospital cases may not be completely analogous, an Ontario Supreme Court Judge in Kokan v. Dales[34] allowed an appeal from the order of Master Dunn who refused to order production of all documents in possession of a hospital concerning treatment of a party. Master Dunn,[35] relying on McCurdy, would not order production because (1) they were not admissible at trial and therefore tantamount to discovery, (2) they were irrelevant and embarrassing, and (3) ...The headnote succinctly captures the reasons for judgment of Lacourciere, J.:

> "An order made under Rule 349 for production of hospital records concerning treatment of a party should not be limited to those documents which would be admissible at trial. Relevance and admissibility can only be determined after inspection..."[36]

In Vanmechelen v. Vanmechelen,[37] McCart, Co. Ct. J., sitting as a local judge of the Supreme Court, hearing a custody application in a divorce proceeding ordered the production and inspection of psychological and psychiatric reports in the possession of a hospital under Rule 349. His Honour distinguished McCurdy on the ground that the sole purpose of the information in the instant case was relevant to custody of the infant child and therefore outside the prohibition set out by Middleton, J. It is submitted that courts, if willing, could distinguish McCurdy on this reasoning in most cases.

It must also be noted that in Perini Ltd. v. Parking Authority of Toronto,[38] the court of appeal judicially held that Rule 347, the companion section to Rule 349, should remove as far as possible, the element of surprise at trial. Therefore, subject to the constitutional validity of Rule 349, noting the recent trend in the case law for full and open discovery, bank records should be subject to production and inspection prior to trial pursuant to Rule 349.

The next question which must be considered is the constitutional validity of Rule 349 when an application is made to produce and inspect bank records. It will also be necessary to refer to, and briefly discuss in this context, section 34 of the Ontario Evidence Act and section 29 of the Canada Evidence Act. Both purport to deal with the production inspection and proof of bank records, but they are inconsistent in their approach and this creates problems.

Rule 349[39] is intended to supplement its companion rules and facilitate full discovery, a state of affairs which is conducive to out of court settlement.

Section 29 of the Canada Evidence Act is substantially similar to the Bankers' Books Evidence Act, 1897.[40] The purpose of the latter statute is set out in Paget's as follows:

> "The object of this Act (Bankers' Book Evidence Act) is to avoid the inconvenience and dislocation of business formerly imposed on bankers by their being compellable to produce their books in legal proceedings to which they were not personally parties. The previous practice was specially vexatious, because in theory the books could only be utilised for refreshing the memory of the clerk or officer who made entries and was summoned as a witness, and the real object of compelling their production was that they were in practice invariably but irregularly put forward and treated as substantive evidence in themselves."[41]

The same reasoning applies to section 29 which is to be contrasted with the purposes of Rule 349.

A brief analysis will now be made of some subsections of section 29 of the Canada Evidence Act. The section applies to "legal proceeding" which "means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes arbitration."[42] The definition of a "court" and "financial institution" are also very broad.[43] The Act provides that:

> S.29(6) "On the application of any party to a legal proceeding the court may order that such party be at liberty to inspect and take copies of any entries in the books or records of a financial institution for the purposes of the legal proceeding...";
>
> S.29(7) "Nothing in this section shall be construed as prohibiting any search of the premises of a financial institution under the authority of a warrant to search issued under any other Act of Parliament of Canada..., unless the warrant is expressly endorsed...as not being limited by this section..., and
>
> S.29(5) "A financial institution or officer of a financial institution is not in any legal proceedings to which the financial institution is not a party compellable to produce any book or record, the contents of which can be proved under this section...."

The leading English cases[44] on the Bankers' Books Act are not of much assistance to the problem because the constitutional issue does not arise. The English jurisprudence interprets the equivalent to S.29(6) very narrowly and limits its application subject to the general rules of discovery.[45] However, it does point out the fact that there may be a conflict between Rule 349 and S.29(6). For example, production and inspection may not be ordered under Rule 349 because on the face of the application the applicant is on a fishing trip of a third party's bank records[46] but this may not be relevant at all to an application under S.29(6).

Prior to the enactment of S.29(7), in the case of R. v. Mowat, Ex parte Toronto Dominion Bank,[47] Lacourciere J. (Ont. H.C.), quashed a search warrant issued pursuant to S.429 (now 443) of the Criminal Code. The court held that:

> "This subsection gives the bank a clear exemption as to (a) production of any original books or records, thus exempting the bank from an order under Rule 349 compelling production at trial by a stranger to an action, and (b) appearance at trial by an officer of the bank under an ordinary subpoena."[48]

As a result, Parliament enacted S.29(7)[49] to remedy the problem with respect to search warrants.

Section 34[50] of the Ontario Evidence Act applies to a "bank to which the Bank Act (Canada) applies" and S.34(4) and S.34(5) are substantially equivalent to S.29(5) and S.29(6) of the Canada Evidence Act. In Haughton v. Haughton,[51] Master Saunders (S.C.O.) considered an application under Rule 230 to compel the attendance of a bank manager for examination as to defendant's husband's assets on a pending motion for interim alimony. Master Saunders considered both S.34 and S.29 of the Evidence Acts and following Tournier[52] held the bank manager was correct in refusing to answer the questions until he had a court order. A subpoena was held not to be a court order. This case may not be analogous because Rule 349 contemplates a court order.

The leading case on point is a decision of the British Columbia Court of Appeal in the case of Sommers v. Sturdy.[53] The facts are briefly that prior to trial the defendant obtained an order from a Supreme Court Judge to inspect and make copies of certain entries in books and records of each of two banks. The banks and some of the persons of whose accounts inspection was sought were not parties to the slander action. The order was made under S.36(5) of the B.C. Evidence Act[54] which is substantially similar to S.29(6) and S.34(5) of the federal and Ontario legislation.

Many issues were raised and the court after reviewing the English authorities held (1) S.36 of the B.C. Act is intra vires as it relates to administration of justice in the province including procedure in civil matters (S.91(14) B.N.A. Act, 1967).

(2) An order under S.36(5) of the B.C. Act is discretionary and is broad enough to cover bank accounts of persons who are not parties.[55]

It is submitted that if this decision correctly states the law concerning production and discovery of bank records then Rule 349 would by analogy also be intra vires as proper delegated legislation. However, it must be pointed out that the decision may have been different if the matter in issue had been a subject matter specifically within the legislative competence of Parliament. For example, if a federal statute exempted a witness from compellability on the ground of national security, a provincial statute to the contrary would probably not apply. Likewise, civil actions in the federal court would be governed by the Canada Evidence Act notwithstanding their civil nature. It cannot simply be said that civil matters are governed by provincial evidence acts and criminal matters by the Canada Evidence Act.

There are two further problems in this area. First, credit unions and loan and trust corporations are regulated in Ontario by The Credit Unions and Caisses Populaires Act[56] and The Loan and Trust Corporations Act of Ontario[57] respectively. Therefore, it would be necessary to review the respective Acts to determine how one could obtain production and discovery of their records because problems unique to these institutions do exist. For example, section 75 of The Credit Unions and Caisses Populaires Act states as follows:

> S.75(1) Except as provided in this Act, no member or other person has any right to inspect the books of a credit union.
>
> (2) Any member or other person having an interest in the funds of a credit union may inspect

> his own account and the books containing the names of the members at all reasonable hours at its head office or at whatever other place they are kept, subject to such conditions as to time and manner of inspection as the by-laws may prescribe.
>
> (3) A credit union may by by-law authorize the inspection of any of its books therein mentioned, in addition to the books containing the names of members, under such conditions as are thereby prescribed, and no person, unless he is an officer of the credit union or is specifically authorized by a resolution thereof, has the right to inspect the loan or deposit account of any other member without such other member's written consent.[58]

Secondly, should a party litigant be able to obtain discovery pursuant to section 29 or 34 of the Evidence Acts that he could not have obtained pursuant to Rule 349? The English position is that a Court should be guided by the general rules regulating the inspection of documents before trial.[59] It is submitted that in a computerized payment system a bank may become a major or only record maker of a transaction and therefore depending on the nature of the litigation, third persons' accounts may have to be inspected and produced if disputes are to be resolved. Therefore, applications under the pertinent sections of the Evidence Acts or the Rules of Practice may have to be more liberally granted in a computer payment system.

TRIAL

Assume the parties are unable to settle and the matter proceeds to trial. The continuance of the litigation would be more plausible if the defendant had lost his cancelled cheque, the plaintiff was a bad bookkeeper and/or there were many sales transactions during the period between the parties for identical

goods at the same price as the dispute in question.

(a) The Plaintiff's Case

The plaintiff commences his case by reading in the examination for discovery of the defendant who admitted ordering and receiving the goods. Alternatively, the plaintiff could introduce the purchaser's purchase order through his order clerk as an admission against interest exception to the hearsay rule. Similarly, the delivery man would testify that he personally delivered the goods and the purchaser's receiving clerk signed the delivery slip which would also be tendered as an admission against interest. However, at issue is payment and this will necessitate calling the vendor's accountant.

Assuming the accountant has no personal knowledge, and the rules of admissibility concerning past events recorded and present memory revived[60] do not apply, then the accountant's evidence will be objected to as hearsay. The old common law exception to the hearsay rule that statements made in the course of duty does not apply because the declarant, whoever he may be, may not be dead.[61] Secondly, the expanded exception, as set out in Ares v. Venner[62] by the Supreme Court of Canada may not apply because the declarant may not have had personal knowledge[63] at the time the records were made.

The plaintiff, therefore, will utilize section 36 of The Ontario Evidence Act which states as follows:

S.36(1) -

(a) "business" includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise;

(b) "record" includes any information that is recorded or stored by means of any device.

(2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. 1966, c. 51, s.1, part.

(3) Subsection 2 does not apply unless the party tendering the writing or record has given at least seven days notice of his intention to all other parties in the action, and any party to the action is entitled to obtain from the person who has possession thereof production for inspection of the writing or record within five days after giving notice to produce the same. 1969, c. 36, s. 1.

(4) The circumstances of the making of such a writing or record, including lack of personal knowledge by the maker, may be shown to affect its weight, but such circumstances do not affect its admissibility.

(5) Nothing in this section affects the admissibility of any evidence that would be admissible apart from this section or makes admissible any writing or record that is privileged. 1966, c. 51, s.1, part.

It is to be noted that "double hearsay" is admissible pursuant to subsection (4) and that subsection (5) sustains the exclusionary rule regarding privilege.

In the hypothetical case under discussion, the accountant testifies from his personal knowledge as supervisor of the billing department to the effect that the records qualify under The Ontario Evidence Act.[64] The records then become part of the evidence, and are prima facie proof that the defendant was billed and that the account is unpaid. That completes the plaintiff's evidence as he has proved all the essential elements of his case. The leading cases on the scope and meaning of section 36 are found in recent decisions of the Ontario Supreme Court and the Supreme Court of New Brunswick.[65]

(b) Defendant's Case

The defendant does not dispute ordering and the reception of the goods but remains firm on his position that he paid for them. The theory of the defence has already been put forward during the cross-examination of the plaintiff who has admitted that his bank deposit book and his bank statement showed a credit in the exact amount of the price of the goods. This, however, does not prove that this payment was from the defendant or that the payment was for the goods in question although an inference could be made. (Assume for the present that the cancelled cheque was not available at the discovery stage.) The defendant's accountant will also testify, pursuant to section 36 of The Ontario Evidence Act, that the account was paid according to his accounts payable books.

If the trial ended at this stage, the plaintiff having the burden of proof would fail unless he successfully cross-examined the defendant's accountant's bookkeeping system or the records themselves. Inspection and discovery would play an important role in being able to effectively cross-examine for obvious errors, lack of personal knowledge of the accountant or that the accounting system does not comply with recognized accounting principles, etc. It should be noted that in a computerized system of a point of sale transaction, cross-examination will become a much more difficult art. Most lawyers can read a ledger card but a computer record or a computer programme requires special skill and knowledge. The analysis will now concentrate on certain aspects of cheques and proof of payment.

(i) Delivery of Cheque

Assume the defendant could prove that his cheque was sent to the vendor and that the vendor received it. Normally, when a cheque is received the payee assumes the cheque will clear and he makes his bookkeeping entries accordingly. However, delivery and acceptance of a cheque is not acceptance of payment but is conditional on the fact that it will be honoured. Therefore, delivery and acceptance is not, standing alone, proof of payment

even though, an inference of such fact may be made.

(ii) Cancelled Cheque

The making of the cheque is not proof of payment nor are the notations on the cheque stub. The "paid" stamp on the cheque is hearsay and, technically speaking, is not admissible in evidence to prove the truth of its assertion. It is irrelevant for any other purpose. The endorsement on the cheque is all important. "For deposit only to the account of the plaintiff" is an admission against interest of payment. Therefore, the endorsement is the equivalent of a "cash receipt" and, it is submitted, would end the litigation in the defendant's favour unless the plaintiff could show it was a forgery or credited for another outstanding debt.

(iii) Lost Cheque - Best Evidence Rule

If the defendant had lost his cancelled cheque then he would have to prove it by secondary evidence.

Historically the best evidence rule stated that the evidence admissible to prove a particular fact was to be the best evidence of that fact.[66] This had an inclusionary as well as exclusionary effect. In more modern litigation this amounted to little more than that secondary evidence of a document could not be admitted unless the party tendering the evidence satisfied the court that the original was lost, destroyed or otherwise unavailable. This rule (at least with respect to cheques) seems to have been abridged by section 35(2) of The Evidence Act of Ontario.[67]

Section 35(2) provides:

> Where a bill of exchange, promissory note, cheque, receipt, instrument, agreement, document, plan or a record or book or entry therein kept or held by a person,
>
> (a) is photographed in the course of an established practice of such person of photographing objects

> of the same or a similar class in order to keep a permanent record thereof; and
>
> (b) is destroyed by or in the presence of such person or of one or more of his employees or delivered to another person in the ordinary course of business or lost,
>
> a print from the photographic film is admissible in evidence in all cases and for all purposes for which the object photographed would have been admissible.

Note that the cheque needn't be lost or destroyed; it can have been delivered to another person in the ordinary course of business. Accordingly, a copy or a photograph of the defendant's cheque would be in the bank records and would be admissible if it were not excluded for some other reason. Moreover, it can be persuasively argued that the best evidence rule only requires the original document to be produced when its existence or contents are the issue. This may not be the case where the issue is payment. Therefore, the plaintiff cannot object that the original is not being presented.[68]

(iv) Bank Records and Business Records

The previous discussion concerning the constitutional validity of the Canada and Ontario Evidence Acts concerning banks and banks as businesses equally applies here. Assume the defendant, in order to prove payment, introduces either documentary evidence or issues a subpoena to a bank manager.

It is arguable that notwithstanding section 29 or section 34, a bank manager is compellable[69] to attend at trial or alternatively the party litigant may wish to take advantage of the provisions of the Evidence Act. However, it is submitted that the better view is that a party litigant must comply with the provisions concerning compellability of the respective Evidence Acts.

Sections 29 and 30 of The Canada Evidence Act and sections 34 and 36 of The Ontario Evidence Act deal with bank records

and business records respectively. It has been held by Mr. Justice Walsh in the case of Farris v. M.N.R.[70] that the provisions of section 29 and 30 of the Canada Act are complimentary and both sections are applicable to banks and banking records.

A discussion of the Acts will follow with an emphasis on their similarities and differences.

First let us discuss the special business record -- the copy of the bank record. Both section 34 of The Ontario Evidence Act, and section 29 of The Canada Evidence Act deal with copies of bank records. It is very important to note that these sections only affect copies, they do not expressly change the nature of the original books. They are still hearsay, although it could be argued that if the copies are admissible , ipso facto the originals are too. In any event, both statutes are substantially the same and under them copies of bank records are prima facie evidence of their contents provided that the entries were made in the ordinary books or records of the bank in the ordinary course of business, and provided that the book or record is in the custody of the bank and that someone can swear that the copy is a true copy. The differences are that the Ontario section only applies to bank records in actions where the bank is not a party, the federal section applies to all legal proceedings and refers to financial institutions and not banks. Neither section requires notice of the use of the copy of the record unlike the general business records sections.

Sections 36 of the Ontario Act and 30 of the Canada Act are the business records sections. The Ontario Act states that on 7 days notice a record of an act is admissible as evidence of that act if the record was made in the ordinary course of business and if it was ordinary to make such records at or within a reasonable time thereafter the act occurred. Subsection 4 of section 36 expressly allows hearsay in records (double hearsay at common law) to be admissible when it states that a record is

not inadmissible because of lack of personal knowledge of the maker.

The Canada Evidence Act drops the express requirement of contemporaneity (although that may be inherent in the definition of a business record) and makes records made in the usual and ordinary course of business admissible. There is no subsection which makes records containing recorded hearsay admissible. Indeed, as Greenspan[71] points out, it is possible that the opening words of the section are designed precisely to prevent that. Section 30(1) states that "where oral evidence in respect of a matter would be admissible...." While Greenspan's comment is plausible, it is hardly the last word. Indeed the section received judicial interpretation in R. v. Penno,[72] a decision of the British Columbia Court of Appeal. In that case a store inventory sheet was put into evidence for the purpose of showing that certain coats found in the possession of the accused were the property of the store which had been robbed. To make the inventory sheet, one clerk called out the coat numbers and another wrote them down on the sheet. Neither one of them checked the work of the other. Clearly the maker of the business records had no personal knowledge of the contents of the record yet McFarlane J.A. said the record was not hearsay because it was not put in to prove the truth of what was recorded (the presence of the coats in the store) but to prove that the record was made accurately. The learned Justice went on to say the record was also admissible by the rule in Ares v. Venner, and by virtue of S.30 of the Canada Evidence Act. In regard to the latter authority the learned Justice was cognizant of the requirements of the opening words of the section. He noted that oral evidence of the taking of the inventory was admissible and I think he must have concluded that this meant the business record was admissible too. Whereas Greenspan seems to suggest that it has to be the same evidence in respect of a matter, McFarlane J.A. seems to think that the requirement is that there be any oral evidence in respect of the matter. The case is most

certainly authority for the complexity of the problem of section 30.

This difference between the two acts on the subject of hearsay is significant at present and its importance will be increased as more and more business records are simply made by machines on the basis of what they are told by an out of court asserter.

A third area of significant difference is that of "negative proof," that is to say, when it is proved that event X did not take place by proving there is no record of X occurring. This mode of proof assumes infallible record keeping and it is obviously of dubious value. This notwithstanding, the Canada Evidence Act expressly provides for negative proof in two cases. The Ontario Act is silent on this point. By section 29(3) the fact that a search of the records of a financial institution reveals no account in favour of someone, is evidence of the nonexistence of an account. This seems fairly reasonable because it seems unlikely that an error would be made in recording such a fundamental fact. Section 30(2) extends this mode of proof to any business record otherwise admissible and this would seem more dangerous, particularly in light of the fact that many payments disputes are the result of omitting to make a proper credit entry.

The following is a summary of the relevant differences in the rules of evidence as contained in provincial and federal statutes. The differences are underlined.

Compellability:

> The Canada Evidence Act says that financial institutions and their officers are not compellable witnesses to prove any matter contained in a financial institution's records, the contents of which can be proved by copies pursuant to section 29(2), in an action to which the financial institution is not a party, without an order, S.29(5).
>
> The Ontario Evidence Act says banks and bankers are not compellable witnesses to prove any matter contained in

a copy of a bank record, the contents of which can be proved by copies pursuant to S.34(2), in an action to which the bank is not a party without a judge's order, S.34(4).

Admissibility of Bank Records

The Ontario Evidence Act provides that a copy of an entry in a book kept in a bank is prima facie evidence of the entry and of the matter recorded in an action to which the bank is not a party, S. 34 (2).

The Canada Evidence Act provides that a copy of a record kept in a financial institution is prima facie evidence of the entry and of the matter recorded in all legal proceedings. S.29(1)

Admissibility of Business Records

A The Ontario Evidence Act allows that a business record is not inadmissible because the maker of the record had no personal knowledge of what is recorded. S.36(4)

The Canada Evidence Act has as a prerequisite to admissibility the requirement that it be possible that oral evidence of the matter be given. This may keep out records about the content of which the maker had no personal knowledge. S.30(1)

B The Ontario Evidence Act requires that business records be made at the time of the act recorded, or within a reasonable time thereafter. S.36(2)

The Canada Evidence Act has no express requirement as to the time of making a business record. S.30

Negative Proof

The Ontario Evidence Act does not say anything about negative proof.

The Canada Evidence Act expressly authorizes negative proof. S.29(3) and 30(2).

So there are the differences which present a constitutional issue and as we have seen in the Sommers case above, even when the statutory provisions are the same, it is important to know

which statute applies. That is the essential constitutional issue.

CONSUMER TRANSACTION

Most of the analysis set out herein is applicable to a consumer transaction. However, the business records sections of the Evidence Acts do not apply to a consumer and therefore a consumer defendant in a suit may be at a disadvantage. Following our hypothetical case, the plaintiff's commercial enterprise would introduce evidence of non-payment through the accountant's records. The defendant would not have similar off-setting evidence to prove payment as would a commercial vendor and he can do so only through viva voce evidence. Depending on the witnesses' memory, articulation, etc., he may have an uphill battle.

It is also appropriate to make a few general comments about the Small Claims Court Act of Ontario.

Section 72 of the Act provides its own best evidence rule in that "a cheque...shall be filed with the clerk before judgment, unless...it is lost or for other reason not produced." As well, section 90 provides for summary judgment which has the same function as Rule 33 of the Rules of Practice except that it is more complicated. Although Rule 34 of the Rules of Procedure[73] of the Small Claims Act provide for inspection and production of documents, it is limited to those in possession of the other party. Therefore, bank documents would not be available under the rules.

There is no provision for discovery but the appointment of a referee for a court and pre-trial hearings should be sufficient to have knowledge of the other side's case. Lastly, and most important, section 96a of the Act does away with the rules of evidence.

Section 96a -

(1) Subject to subsections 2 and 3, the judge may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in the Supreme Court,

(a) any oral testimony; and

(b) any document or other thing, relevant to the subject-matter of the proceedings and may act on such evidence, but the judge may exclude anything unduly repetitious.

(2) Nothing is admissible in evidence at a hearing,

(a) that would be inadmissible by reason of any privilege under the law of evidence; or

(b) that is inadmissible by any statute.

(3) Nothing in subsection 1 overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceedings.

(4) Where the judge is satisfied as to its authenticity, a copy of a document or other thing may be admitted as evidence at a hearing.

Therefore, self-serving evidence of cheque stubs, hearsay contained in bank statements, etc., are all admissible. This may be indicative of the role that the rules of evidence will play in future civil litigation in all courts - very little, because for the most part, the rules of evidence will be legislated out of existence.

CONCLUSION

The analysis has shown proof of payment in a hypothetical commercial transaction. It is apparent that not all of the problems concerning this aspect of proof pointed out in the existing system have been satisfactorily resolved. However, the importance of documents (including cheques) in the resolution of a commercial or consumer dispute is obvious. The litigation process would be dealt a swift blow if parties could not obtain

inspection and production of documents or full discovery from their adversary as well as if the business records and bank records exceptions to the hearsay rule did not apply.

This poses the very problem of proof of payment in a computerized electronic funds transfer system. What documents will cease to exist, and will their replacement fit within the framework of the existing litigation process? Will computer records be business records and will the new form of the bank statement provide the same function as a cheque. These questions will be discussed in Part II of this paper.

PART II

INTRODUCTION

"An electronic payment system will have its proof of payment and evidentiary problems, based on the utilization of a different medium."[74] The problems which arise will depend to a large extent on the type of system that is utilized, the records which are kept and the amount of particulars set out therein. For example, will the consumer receive a monthly statement similar to a Chargex statement or will it simply be a list of debits and credits? Furthermore, what will be the type of paper generated from a transaction? Will the purchaser's home address and number be included in the vendor's records to be sent out monthly or at a fixed pre-determined date to the purchaser, or will it merely record a sale and make records for internal use such as recording sales volume and tracing inventory?

Assume a point-of-sale transaction is described in the following steps:[75]

> "(1) Seller inserts customer's I.D. card in terminal and sales slip in printer;
>
> (2) Seller keys in amount, terms and source of credit;
>
> (3) Local center (i.e. computer) checks validity of account number and balance (or credit) in buyer's account. If valid, center then debits buyer's account and credits seller's account."

If there were no further steps in the transaction, there would be many proof of payment and evidentiary problems. However, this may be the type of system utilized in most sales transactions in the future.

In the interval between the existing system and the computer system set out above, there may be two additional steps:

"(4) Terminal prints out customer's account, number, amount, terms, date and time on the sales slip;

(5) Both buyer and seller retain a copy of the sales slip." [76]

This would give the customer some feeling of security because he would still retain his piece of paper, which, if he were a good collector, would take the place of cheques. However, will he receive a monthly statement indicating amounts only or will it be more descriptive? Even if there were a descriptive statement, it would originate from his bank and not from the vendor. This distinction is of signal importance because the bank's statement that an amount has been paid to the vendor, does not have the same evidentiary value as the vendor's admission that he has been paid. Indeed, the bank's statement may not even be admissible. Between the seller and buyer, there will not be the traditional flow of monthly invoices showing transactions. Again, some of the functions of bookkeeper will be transferred to the purchaser from the vendor as is the case now when a bank returns to the customer his original cheques.

Commercial transactions may be different in that the purchaser's and vendor's computers may be on line and therefore the purchase order will be an electronic impulse to the vendor's computer. The result will be that both purchaser and vendor will be able to keep their own records. These records will be in a different form, but nonetheless, they will be business records.

A different system or a part of the system would be the home phone terminal. The preauthorized payment of such things as mortgages would present little problem as the monthly amount would not vary and it would not differ markedly from the existing situation. However, what if a person orders a turnip from his grocery store C.O.D. and pays by sending an electronic impulse to the local computer center by phone. There would be no sales slip and therefore it may be necessary for the bank to send out a descriptive billing statement having more detail on it than that on today's monthly bank statements simply for personal record keeping. The evidentiary status of such documents is another matter altogether.

Reference should be made back to the matters discussed supra as the paper will now trace the same dispute resolution process but with one noticeable variable -- the study will concentrate on the problems as if a computerized payment system was utilized.

EVIDENCE GENERALLY:

A duplicate sales slip marked "paid" by the creditor, would perform the same function as a cheque does in today's system. Assume, however, that this slip is lost by the defendant or that the type of system does not produce such a sales slip or alternatively, the sales slip is similar to a cash register receipt which is not descriptive an therefore of little evidential value. The only descriptive records that would exist are the bank statement and a printout from the vendor's or purchaser's computer depending on what type of system is in place.

These documents are private documents and it is submitted they are hearsay. A recent decision of the Quebec Superior Court on computer evidence is reported in French but the headnote has been translated into English. It states as follows:

> "At the preliminary inquiry on a charge of possession of a stolen vehicle, evidence of the fact that the vehicle had been stolen was introduced by a police officer who testified that he had obtained a printout from a computer stating that the vehicle was stolen. The data provided by the computer constituted hearsay and could not prove the proof of its content. It was thus illegal evidence, which amounted to a total absence of evidence on one of the essential ingredients of the charge." [77]

Therefore, their admissibility would depend on the expanded common law business record exception as set out in Ares v. Venner or the provisions of the Evidence Acts. [78]

The Ontario Law Reform Commission [79] substantiates the position that if the computer records are offered to prove the

truth of the assertion, they violate the hearsay rule. Sections 1 and 2 of the English Civil Evidence Act, 1968[80] provides for hearsay to be admitted as evidence of facts stated provided certain statutory conditions are met. Section 5 of the English legislation provides "...a statement contained in a document produced by a computer shall, subject to the rules of the court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible..."[81] There are express conditions which must be complied with before the evidence is admissible and it is interesting to note that a series of computers, etc. is for the purposes of Section 5,[82] constituted as a single computer. This provision in effect provides that double hearsay (i.e., one computer talking to another) shall be legislatively deemed to be one computer.

In the United States a form of descriptive billing has been made mandatory by S.411 of Public Law 93-495 which amended the Consumer Credit Protection Act 15 U.S.C. § 1601 et seq. (of which Title I is known as the Truth in Lending Act.)

The provision can now be found in 15 U.S.C.A. §§ 1637.[82A] It applies to open end consumer credit plans (which includes tripartite cards) and requires disclosure in the monthly statement of, inter alia, the amount and date of each credit extension and identification of same sufficient to enable the obligor to identify the transaction. The section was considered in White v. Arlen Realty & Development Corp., C.A. Md. 1975, 540 F.2d 645 and it was held that a charge slip and cash register tape did not satisfy it because the description of the merchandise as "Apparel and Hard Goods" was insufficient. Although this statute was aimed at protecting consumers from unfair credit billing practices, a similar provision for any electronic funds transfer including debit transactions would be desirable from an evidentiary point of view.

Another solution to the proof of payment problem has been proposed by U.S. Senator Riegle in a proposed EFT statute (Senate Bill S.2546).[82B] S.906 of the draft act requires that a documentary

record of every consumer initiated EFT transaction be produced. It also stipulates in detail what the record is to contain. S.906(e) is perhaps the most significant in the context of proof of payment as it states that every such EFT record is prima facie proof of the payment it purports to record. Such a law solves both the problem of the lack of evidence, and where such evidence exists, its admissibility and weight.

Evidence from a computer may be admissible on other grounds. The common law and the statute law allow, under certain circumstances, for expert evidence[83] to be given. Also, courts have accepted evidence of machines or instruments when reported by witnesses, such as the results of a radar test, if such instruments were designed as measuring devices.[84] It may be argued therefore that a data processing manager should be able to give an opinion as to whether or not there has been payment, based on his expertise and the computer printout. Alternatively, it could be argued that the computer is a device for the purpose of making debits and credits and is, on the basis of the measuring device exception, admissible.

EXAMINATION FOR DISCOVERY AND PRODUCTION OF DOCUMENTS

(a) Generally:

There will not be available any human witness who will have personal knowledge of a commercial transaction. The clerk, who completed the sale may be identifiable by his key code on the computer record but it is very unlikely that he will have any personal recollection of the event. Also, traditional commercial paper such as delivery slips, purchase orders, or cheques may not exist and depending on the computer system, a sales slip may not be available. Unless the purchaser's computer is on line with the vendor's computer, he will not have

a computer record of the transaction, other than his own accounts payable. The individual consumer may have no documentation at all, except a non-descriptive sales slip and a bank statement indicating debits and credits on a particular date.

In our hypothetical transaction, the defendant's position is that he has paid for the goods. The defendant alleges that either the plaintiff's computer failed to record his payment or alternatively it credited his payment to a third party. The defendant therefore will probably examine on discovery, the plaintiff's data processing manager. As stated above, neither the manager nor probably anyone else in the plaintiff's employment will have personal knowledge of the transaction.

Assuming the defendant utilizes the Rules of Practice to obtain inspection and production of documents, the first problem to arise is whether the magnetic form of the record (core etc.) is a "book, paper or document." Even if the magnetic form is produced, it may be of little evidential value by itself. However, the defendant, after learning the languages and programme of the plaintiff's computer, may wish to maintain the original to do various tests or programme runs with that tape (see infra on this problem). Although not directly on point, it is interesting to note that in Mouammar v. Bruner,[85] Master Garfield held that a voice tape recording may be regarded as a document for the purposes of discovery. He adopted the judgment of Armour, C.J. in Fox et al. v. Sleeman et al. (1897) which stated:

> "A 'document', in the sense in which the term is used in this treatise, is an instrument on which is recorded, by means of letters, figures, or marks, matter which may be evidentially used. In this sense the term document applies to writings; to words printed, lithographed or photographed; to seals, plates, or stones on which inscriptions are cut or engraved; to photographs and pictures; to maps and plans."[86]

For the year 1897, this was a very liberal interpretation of the word document. It could be argued that in to-day's scientific community, a tape is the equivalent of a document and therefore is compellable on discovery. Otherwise, the rules will need to be amended to more broadly define "document".

Both the individual consumer and the commercial purchaser would wish to obtain a computer print-out of the defendant's record indicating lack of payment. The reason is that the examining solicitor should at least determine the case he has to meet. The print-out itself would be a document but it should be noted that it may not be in existence at the time of the examination and therefore the rules, in order to provide full discovery, would have to permit the production of a print-out.

The print-out and the tape will not allow the solicitor to test the veracity of the computer system. Therefore, specialized knowledge of computers would be helpful in obtaining information concerning the computer programme, the method utilized to retrieve information, the operating manual and procedure, administrative control, input errors, hardware failures and environmentally induced errors.[87]

This information, although beneficial to the examining solicitor, needs to be utilized in a more concrete way to determine for his client the veracity of the plaintiff's records. Rule 372 which authorizes observation or experiments may not be broad enough to provide for a computer analyst to test the plaintiff's computer. Assuming an order is granted, then a matter of confidentiality arises. For example, in running a programme, the defendant's computer analyst may become aware of the plaintiff's volume of sales, price discounts to competitors etc. which he would not obtain under existing discovery rules. A related problem is who should be burdened with the costs of this computer time which may be worth more in value than the lawsuit itself.

In the event the defendant's computer is on line and it has its own records of the sales transaction then the above analysis with respect to the plaintiff, would be equally applicable to the examination of the defendant and the production of his computer records.

It should be noted that the production of the magnetic tape and the print-out may be of little value to the individual consumer or the small commercial enterprise. As pointed out in Part I, there are several purposes underlying the theory of discovery but unless the individual is willing to hire a computer analyst he cannot obtain any helpful admissions. Basically, he may understand the plaintiff's computer system and the case he has to meet but without an analyst he is not in a very favourable position to actually test the plaintiff's evidence. From this proposition it follows that the individual may have to abandon his position because his uncorroborated viva voce evidence may not be a match for the persuasive prima facie evidence of the computer print-out.

(b) Discovery and Production of Bank Records Prior to Trial:

The issues of privilege, and constitutional validity of the Federal legislation (S.29) and the Provincial legislation (S.34 and Rule 349) remain unchanged when the payment system moves into the computer age. However, the issue of compellability may have problems particular to the computer payment system which do not now exist.

As pointed out in the introduction, the nature and type of records kept in a computer system are as yet not precisely defined. Assume the transaction in question is the touch tone phone electronic impulse sales transaction and the monthly bank statement is not descriptive. Surely, in this type of transaction, the bank is no longer a third party but is really the institution which undertakes to be the record keeper for one or both of the

parties. It could be argued that under these circumstances Rule 349, S.29 (Can.), S.34 (Ont.) should be liberally interpreted to allow full discovery.

Interpretation problems which arose with respect to discovery generally are also apparent in considering Rule 349. Rule 349 speaks of a "document" in possession of a third party. The issues of whether a magnetic tape is a document and whether a print-out which is not in existence at the time of application can be ordered must be resolved.

Rule 349 also provides that "...a court...may give directions respecting the preparation of a certified copy ..." It can be argued that a computer print-out is not a copy of a record but is a computer translation of a record.

One further problem in regard to Rule 349, which may also be applicable to orders sought under S.29 (Can.) and S.34 (Ont.), is the cost to the third party of the application. In a recent Ontario case of Jameson v. Margetson,[88] His Honour Judge Waisberg (Co.Ct.J.), considered an application under Rule 349 for production and inspection of cheques from O.H.I.P. The cost to O.H.I.P. was stated to be $6,179.00. His Honour followed McCurdy v. Oak Tire but went on to state:

> "It would seem to me that this matter should be left for determination to the trial judge. It is usually preferable to have these matters disposed of before trial, but in this case it is important to know whether the plaintiff could obtain the information from his own records; whether the relevancy of the information is of greater weight than the cost thereof; and whether the costs of O.H.I.P. should be paid to them for supplying the information."[89]

In our hypothetical touch tone phone sales transaction, these questions set out by Judge Waisberg are very pertinent. For

example, must the bank search for all transactions within the relevant time frame to determine if a credit was made to a third account in the amount of the sale? His Honour does not answer the question of what if retrieval is more expensive than the lawsuit itself although he compares relevancy with costs. In the case of the individual consumer, this search may result in the necessary corroborating evidence being produced. Quaere whether the system should pay because it is being utilized for its economies of scale or whether the individual applicant should pay?

S.29 (Can.) and S.34 (Ont.) of the Evidence Acts dealing with an application to a court to inspect and take copies of records, also have some interpretation problems. For example, both sections are concerned with an "entry in a book or record". It is submitted that the word record is broad enough to include a magnetic record but both sections also provide for the applicant to "inspect and take copies of any entries in the books or records...". Again, the problem is providing print-outs, which are not copies, strictly speaking, but are in fact translations. It could also be argued that the print-outs are privileged if they were previously made for the purposes of litigation.

Section 34(6) of the Ontario Act provides that the court has a discretion to order costs for the application and anything done under the order, including an order against the bank "where such costs have been occasioned by a default or delay on the part of the bank".

This provision may be a very important and litigated aspect of an application under S.34 and it is noted that neither Rule 349 nor S.29 (Can.) expressly provides for an order of costs for "anything done or to be done under an order of the Court" as does S.34 of the Ontario legislation.

Lastly, secrecy, with respect to the magnetic tape itself may be an issue. There will be other customer accounts on the tape

and therefore the inspection of the tape or a copy of it, if that is what is ordered, may have to be closely supervised or edited respectively.

Therefore, in conclusion, there are some problems with respect to discovery which are unique to the computerized payment system. An argument could be made that the existing rules and laws, liberally interpreted could be adequate, but it is submitted that the better view is that the existing rules and laws may have to be amended to be more in accord with the realities of the business and banking world.

The purpose of pre-trial procedures is to obtain full discovery, define issues, obtain admissions before trial and promote settlement. It is submitted that the utilization of computers in consumer and commercial transactions may, by their nature, not be in accord with those objectives. Therefore, special rules may have to be enacted to allow full and complete discovery. However, this opinion is dependant upon the type of computer system which is in place. For example, if the defendant had a duplicate descriptive sales slip, i.e. the cheque equivalent, and a descriptive bank statement then the rules may not have to be changed as drastically.

TRIAL

(a) Plaintiff's Case

Assume the matter proceeds to litigation and the bank statements are not descriptive and the defendant has lost his duplicate sales slip. The first and only witness for the plaintiff would be his data processing manager. Neither he nor anyone else has personal knowledge of the transaction, but he does have the computer print-out indicating a sale to the defendant. He will also testify that there has been no payment recorded for the transaction.

As stated above, there is no human with personal knowledge and the print-out is hearsay. The liberalized common law exception

as set out in Ares v. Venner may not apply because no one had personal knowledge of the matters recorded. The U.S. counterpart to the common law business record exception is called the "shopbook rule." This rule has been replaced in most states by a business record statute or the Federal Rules of Evidence. It is interesting to note that in Mississippi, a state which does not have a business records statute, the state Supreme Court held that central computerized records were admissible in evidence under the common law exception provided certain conditions were satisfied.[90] However, in R. v. Rowbotham, His Honour Judge Borins (Co.Ct.J)[91] refused to admit "documents ... from a computer" under the exception of Ares v. Venner. It must be pointed out that the witness in Rowbotham had no knowledge of the operation of the operation of the computer or of how the documentscome into existence. Provided sufficient evidence of the integrity of the computer were adduced, a court may be persuaded to further expand the common law business record exception.[92]

The more acceptable approach, it is submitted, would be to rely on the statutory exception set out in S.36 of The Ontario Evidence Act. Section 29 of the Canada Evidence Act relating to the records of financial institutions was copied from the English Banker's Books Evidence Act, 42 Vict. c.11. Section 36 of The Ontario Evidence Act was modelled after the U.S. Federal Business Records Act.[93] The American case law on these statutes is divided on the subject of the admissibility of computer evidence. One series of cases holds that computer outputs are admissible on a basis similar to that for manual business records.[94] The better view is to be found in a line of cases which held that litigants seeking the admission of computer evidence under the business records exception must first offer an evidentiary foundation dealing with the possible errors inherent in such records.[95] Those include, environmentally induced errors, hardware failures, systems design and programming errors, operating procedure errors, and input errors.[96] Until the courts become more familiar with computer evidence, establishing the foundation for admissibility

may be very expensive because of the amount of court time required.[97] As a result the potential costs of the litigation may deter the individual consumer from litigating his claim.

S.36(2) (supra p. 22) does not require that a business record be made by a person but only that it be made; "(1) in the usual and ordinary course of business;" and "(2) that it was in the usual and ordinary course of such business to make such writing or record;" and "(3) it was made at the time of such act, transaction... or within a reasonable time thereafter." The data processing manager could attest to these facts concerning the usual and ordinary course of business as well as the fact that the record was made instantaneously with the transaction. S.36(4) provides that lack of personal knowledge does not affect admissibility but only goes to weight. For a detailed analysis of the procedure to be followed, reference should be made to a recent Ontario Supreme Court decision of Griffiths, J.[98]

The definition of record in S.36(1) is broad enough to include the magnetic tape and discs etc., but as pointed out earlier, tapes themselves are not of much evidentiary value as computers do not keep ledgers like bookkeepers. The transactions are recroded chronologically or serially within the machine and not according to customer. When a list of all a particular customer's transactions is requested the memory device is searched and the list or "ledger equivalent" is produced. In this sense the paper "records" are synthetic creations put together by the machine based upon its records, and it could be said that the true records are the tapes, discs, or ferrite cores in which the transactions are stored in a machine language. If the latter is true, then the tapes are admissible and the print-outs are documents which are prepared for the purpose of litigation and may even be hearsay. There is the further problem that a print-out may not be the "best evidence" and since the original is available, the tape and not the print-out should be put into evidence.

The Canada Evidence Act appears to have solved these problems with S.30(4) which provides:

> (4) Where production of any record or of a copy of any record described in subsection (1) or (2) would not convey to the court the information contained in the record by reason of its having been kept in a form that requires explanation, a transcript of the explanation of the record or copy prepared by a person qualified to make the explanation, accompanied by an affidavit of that person setting forth his qualifications to make the explanation, attesting to the accuracy of the explanation and sworn before any commissioner or other person authorized to take affidavits, is admissible in evidence under this section in the same manner as if it were the original of such record.

It is submitted that the Canada Act contemplates the computer storage mechanism being considered the record, and for the translation of the computer record. This may negate the argument that a computer reconstruction or synthesis of a business record is a privileged document, the rule for which is also preserved in the Canada Act by S.30(10). Since the transcript contemplated by S.30(4) is what is prepared for the purpose of litigation and not the record, there is no problem. Powell has suggested that even considering the print-out as the record is no problem because it is not a document prepared for litigation but a simple retrieval of information stored in the ordinary course of business.[99]

The fact that print-outs are made as requested raises the question of whether they are in fact records made in the ordinary course of business as required by the statutes or whether they are made for the purpose of litigation and therefore privileged.

The requirement that the records be made in the ordinary course of business is to prevent biased records, that is those prepared by a non-impartial party, from being put into evidence. While it may be thought that a computing machine is the ultimate in objectivity it must be remembered that it must be programmed to retrieve information and that a bias or error could be programmed in 100. So it remains vitally important to know exactly what "in the ordinary course of business" means yet there are few Canadian cases which interpret

these words in the context of computer print-outs. In McGriger v. Elgin County Board of Education[101] Mr. Justice Grant held that transcripts of examinations for discoveries were not records made in the ordinary course of business within the meaning of S.36(2). In his reasons, Grant J. held that such transcripts were not records of transactions, but only a statement concerning the same. Nor was it the usual business of the school board to be making such statements or records. Quaere however, whether the transcripts were made in the course of the special examiner's business-recalling that S.36(4) does not require the maker of the writing to have personal knowledge of that which is recorded?

More recently Mr. Justice Grange interpreted "the ordinary course of business" as far as the common law rule was concerned. In Re Waltson Properties[102] the issue was whether handmade summaries of computer print-outs were admissible under the business records exception to the hearsay rule. It was held that they were not because the summaries were prepared specially and only for use in the litigation and thus not in the ordinary course of business. Grange J. lamented the fact that the print-outs themselves were not in evidence, suggesting that a print-out made in the ordinary course of business would be admissible. The ratio of the case however suggests quite strongly that a print-out made up only for litigation, would be inadmissible both at common law and under any of the business records sections of the statutes.

More recently, although not concerned with computer print-outs specifically, Mr. Justice Griffiths in Setak Computers v. Burroughs[103] extensively reviewed the Ontario, and some leading U.S. cases on the scope of the statutory business records exception. At issue was whether minutes of meetings between the plaintiff and defendant, which took place prior to litigation being contemplated, for the purpose of resolving difficulties between the parties over a computer lease were admissible. The court held not only that these minutes were admissible but also the minutes of internal meetings of

defendant were admissible in the plaintiff's case in chief. Griffiths J. liberally interpreted S.36 and held that routine records made in the course of a business, as opposed to a private or personal activity, are admissible. Motive only affects the weight to be given to the evidence and if shown to be self-serving then accordingly no weight will be given to them. He followed the decision of Brooke, J. in Adderly v. Bremner that "the minutes may not be received to prove the validity of any opinion expressed at a meeting."[104]

Therefore, it could be argued that computer print-outs are admissible as prima facie evidence of the transaction. Again, the individual consumer defendant may find it difficult to rebut the prima facie evidence without some documentation to counter the probative evidence of a computer print-out. Also, some consideration should be given to whether certain safeguards should be legislated along the lines of the English statute or whether it would be preferable to wait until the judiciary, in a case by case analysis, make rulings on the conditions for admissibility.

(b) The Defendant's Case

In our hypothetical case, the evidence of the defendant, will be similar to that of the plaintiff's. In all likelihood, it will consist only of the evidence of the data processing manager who will produce the purchaser's business records. The result will be that his evidence will be that according to his records, payment was made. This is prima facie evidence of payment, if believed, and therefore the plaintiff, will not succeed because he has the burden of proof.

In the event the defendant is an individual, he will not be able to utilize the business records provisions of the Evidence Act. Unless he has a companion who could testify to the fact

of handing to the vendor's clerk his card, clearance of credit, and delivery of a sales slip, he may not be able to overcome the plaintiff's prima facie case. Technically the consumer defendant's testimony that he had paid, if believed, could have the same effect as the commercial defendant's records, namely to shift the burden of proof back onto the plaintiff. Actually however it is possible that the defendant's oath that he had paid, absent documentation, would be less persuasive than a properly presented business record.

(i) Delivery of "Cheque"

There will be no cheque but, if the trier of fact accepts the individual's evidence, that his credit was validated on the point-of-sale terminal video screen, then it is possible to infer that payment was probably made. The reason for this inference is that there is no need for the parties to do anything further after validation because validation and payment would be almost concurrent. Therefore, it would be similar to today's cash transaction.

(ii) Cancelled "Cheque"

As stated above, a duplicate sales slip will serve the same function as a cancelled cheque. There is no need for any endorsement because the sales slip is not produced until the purchaser's credit or funds have been validated. In this sense its existence is an admission against interest and therefore admissible. It is submitted though, that absent this piece of paper, the defendant has a problem overcoming the plaintiff's business records if he is an 'individual consumer.

(iii) Lost "Cheque" - Best Evidence Rule

If there was a duplicate sales slip produced and the defendant misplaced or lost it, then he would have to look to his bank for the necessary proof. S.35(2) of the Ontario Evidence Act would be of assistance today as it is concerned with photographs of instruments which are common in today's banking procedure. However, in a computerized payment system, there is no cheque or a picture thereof but instead there is an electric impulse. Therefore, some consideration should be given to amending S.35 of the Evidence Act.

(iv) Bank Records and Business Records

The discussion under this heading in Part I applies equally here. In a consumer transaction in which a sales slip is not produced (or when the sales slip is lost) the bank in effect becomes the consumer's bookkeeper.

The opening words of S.30 of the Canada Act provide: "where oral evidence is admissible". This is very important because it could be argued that since there is no human witness, oral evidence is not admissible and therefore evidence from the bank's computer is not admissible. Also S.30 does not expressly permit double hearsay, which may be inherent in any computer record. As stated above, the Ontario Act permits double hearsay (S.36(4)).

Another major difference between the two Evidence Acts is the problem of negative proof. In a situation where a transaction (i.e. a debit) which might reasonably be expected to have been recorded, is not recorded, the court may, under the Canada Act, admit the record and draw an inference that such matter did not occur or exist. The Ontario Act does not have a similar provision. This is beneficial in that it allows proof of a negative but it also may put an undue amount of trust in computers. It could be argued that evidence could be given by a plaintiff that no record exists which may be held to be circumstantial evidence that the transaction did not occur.

S.30(4) of the Canada Act expressly provides for a translation of a record and it is submitted that the Ontario legislation should be amended to clarify this point, because print-outs may be "translations". Note also there is no parallel provision in the Ontario Act.

CONSUMER TRANSACTION

Part II of this study has pointed out problems which are peculiar to individual consumers. However, S.96a of The Small

Claims Court Act may be literally interpreted and computer print-outs could be admissible for the truth of their assertion. Therefore many of the problems concerning hearsay and the best evidence rule etc. may not apply. However, it may be necessary to permit inspection and production of bank records if the bank is the only record keeper of certain transactions.

RECOMMENDATIONS

1. The admissibility of electronic records must be established and preserved if the litigation process is to continue to function as a system for payments dispute resolution. To this end, the judicial interpretations of the business records provisions of the Canada and Ontario Evidence Acts and the Common Law, in particular S.36 of The Ontario Evidence Act and Rules 326-352, must be monitored. If it is determined that the constructions being placed on the current law are not flexible enough to accommodate innovations in record keeping, then the admissibility of electronic payments records must be ensured by amendments to section 36 of The Ontario Evidence Act. While the statutes with evidentiary provisions relating to "documents" and "records" are of particular significance, all provincial statutes referring to those terms must be reviewed in order to determine whether they accommodate electronic records or printouts. If they do not, either expressly or as a result of judicial interpretation, they should be so amended.

2. Bank records now form an important part of the evidence tendered in payments cases. In recognition of this, such "documents" receive special attention in the Evidence Acts. As the conversion to EFT progresses the number of electronic transactions handled and recorded by banks will increase. Accordingly the judicial interpretations of the bank records provisions in S.34, of The Ontario Evidence Act must be monitored. Again, as in the case of business records, if the development of the case law is unsatisfactory, legislative action must be taken to redefine "record" within the meaning of the act so as to include electronic records of every conceivable type. As a final note on the subject of S.34, serious consideration should be given to expanding the scope of the section by making it apply to all financial

institutions instead of only chartered banks. This could be accomplished by changing the definition of "bank" in the section.

3. The cost of retrieving electronic records for inspection, production and discovery, and for use in evidence at trial can be very considerable and could well exceed the amount of money in dispute. Such costs must be allocated to either the plaintiff, defendant, or electronic record keeper. Rules 347, 348 and 349 govern the production and inspection of documents. Rule 326 governs examination for discovery. Amendments adding cost allocation provisions to these rules should be considered.

4. In connection with the question of record retrieval costs, S.34(6) of The Evidence Act currently gives a judge discretion to order that the cost of bank record inspection be paid by the bank where such costs have been occasioned by default or delay on the part of the bank. Consideration should be given to deleting the requirements of default or delay in this statute so that the social cost of electronic record keeping is borne by those responsible for its evolution.

5. The word "record" is the key to the admissibility of electronic business and bank records. The Ontario Evidence Act states in S.36(1) b, that "record" includes any information that is recorded or stored by means of any device." The Canada Evidence Act states "record includes the whole or any part of any book, document, paper, card, tape or other thing on or in which information is written, recorded, stored or reproduced, and, except for the purposes of subsections (3) and (4), any copy or transcript received in evidence under these sections pursuant to subsection (3) or (4)."

Although both these provisions are admirably broad in scope, they focus on a different concept of "record" in each case. The provincial statute equates record with information. The federal statutes suggest that records are the tangibles on or in which information is stored. [This variation of approach highlights one of the many questions surrounding the records issue which flow from the fundamental fact that electronic records are imperceptible to the human senses. Only when they are printed out or otherwise displayed can they be read.] The "record" could be the stored electronic impulses, it could be the transformation of that record, the printout, or it could merely be the information.

In addition to the basic problem of admissibility referred to in recommendation 2, this range of possibilities raises another significant problem because of the principle of law which states that documents produced for the purpose of litigation are privileged and need not be produced for discovery. If the "record" is the printout then it could be privileged as in many cases no printout of the electronic record is made in the ordinary course of business. If, on the other hand the record is by definition, made when the electronic impulses are created by input to the computer in the ordinary course of business, there can be no suggestion that the record is made for the purpose of litigation, and no question of privilege can exist. Insofar as full disclosure and discovery are essential aspects of civil litigation it is desirable that such procedures be preserved. Accordingly if it is determined that the records referred to in the current laws are the printouts, they will have to be excluded from classification as privileged by statute if this is not accomplished judicially.

6. The admissibility of electronic records under the Evidence Acts is of vital importance because documents generally speaking

are hearsay. A computer generated document, qua document, is therefore hearsay. Moreover, a computer generated document may be double hearsay in that the machine may only be repeating information that it was told, either by a human input operator at a keyboard or another computer or a machine such as an automatic teller machine. If one thinks of the customer at the automatic teller machine putting data into the system, the output becomes triple hearsay.

Section 36(4) of The Ontario Evidence Act circumvents this problem as it purports to make hearsay statements in business records admissible. Section 30(1) of The Canada Evidence Act on the other hand makes business records admissible only where oral evidence in respect of the same matter would be admissible. This suggests that only documents which record the personal knowledge of the maker may be admissible. The cases on the Canada Evidence Act to date do not assist in the resolution of this apparent conflict. Given that there are some matters to which both acts may apply, this inconsistency represents a serious threat to commercial and legal certainty. The cases on both statutes must be monitored and if the conflict is not therein resolved, remedial legislation will be necessary.

7. Consideration should be given to whether a statutory standard of computer evidence reliability is to be imposed (as in England) or whether the veracity, accuracy, and credibility of computer "evidence" is to be tested in the traditional method of cross-examination.

8. Recommendation number 7 deals with the problem of computer evidence at trial, however the problem of the accuracy, and veracity of computer output will present itself before trial, at the stage of production and discovery. In the future, an

affidavit on production pursuant to Rule 347 will undoubtedly refer to computer documents and the operation of the party's computer will be an area for examination on discovery pursuant to Rule 326. Parties will wish to know whether such documents are accurate, whether all relevant documents have been generated and produced and how the computer output was generated. To this end they may wish to access their opponents data processing equipment and run verifying programmes. Such a procedure could conceivably be within the scope of the experiments contemplated in Rule 372. The cases on this rule should be monitored, and if litigants employ this procedure some attempt to regulate it should be made because of the cost and privacy implications inherent therein.

9. There was a time when witnesses were only allowed to testify as to what their knowledge was, they were not permitted to say what their opinions were. Latterly however, expert witnesses have been permitted to give opinions on matters relevant to the lis. The testimony of a medical doctor as to the cause of a particular complaint afflicting a party is a typical example, another is the police radar operator giving evidence of the speed of a vehicle based upon the readings on a radar device. The potential exists for the circumvention of the problems of admissibility surrounding computer records by the use of an expert witness. Such a witness could give his opinion on, for example, the status of an EFT account based on a printout, and his expertise. In the United States, even in cases where it has been sought to adduce computer evidence as business records, the practice in some cases has been to call such a huge volume of evidence to support its accuracy that days of court time and much of the trial is so taken up. If experts were to give opinions based on computer output, similar practices would likely develop to support their opinions. With a view to regulating the volume of supportive evidence necessary in such cases, and therefore costs, consideration should again be given to the

adoption of a statutory standard of proving computer reliability and hence admissibility.

10. The cheque, endorsed by the payee represents a major element of proof in contemporary payments litigation. The obsolecence of the cheque in the electronic age will make some form of equivalent essential. It is submitted that legislation requiring the delivery of documentary evidence of every EFT transaction to the consumer involved should be seriously considered as a solution to this problem. If such documentation is mandated, consideration should also be given to making it prima facie proof of the transaction recorded.

11. The concept of negative proof is dealt with in S.30(2) of the Canada Evidence Act. Much payment litigation flows from non-payment and, the absence of a record of payment in a record is an important piece of evidence of non-payment. As the computerization of business records spreads, the possibility that the absence of a computer record of payment will be the only evidence of non-payment increases, and the importance of negative proof increases accordingly. The Ontario Evidence Act does not have a negative proof provision and for the reasons expressed above, the Ontario law should be reviewed and stated in The Evidence Act.

FOOTNOTES

1. This format was used in an excellent article by Patsy Abelle, "Evidentiary Problems Relevant to Cheques and Computers," 5 Rutgers Journal of Computers and Law (1976), pp. 323-387. This article concerned similar problems in the U.S.

2. Negotiations between lawyers prior to trial can be very informal but nevertheless the rules of evidence play an important role in the discussions.

3. Rupert Cross, Evidence, 4th ed. (London: Butterworths, 1974), p. 1.

4. Ibid., p. 2.

5. Ibid., p. 3; however, a party or his counsel may hand the judge a public document which proves itself without the testimony of a witness.

6. J. Sopinka and S.N. Lederman, The Law of Evidence in Civil Cases (Toronto: Butterworths, 1974), p. 41 give their reasons for "holding hearsay to be a poor form of testimony: (1) the author of the statement is not under oath and is not subject to cross-examination; (2) accuracy tends to deteriorate with each repetition of the statement; (3) the admission of such evidence lends itself to the perpetration of fraud; (4) hearsay evidence results in a decision based upon secondary evidence and therefore, weaker evidence rather than the best evidence available; (5) the introduction of such evidence will lengthen trials."

7. Subramaniam v. D.P.P. [1956] 1 W.L.R. 965, 970.

8. R. v. Rosik [1971] 2 O.R. 47 at p. 70. This case was cited with approval as the definition of hearsay in Ontario by the Ontario Law Reform Commission Report on The Law of Evidence (1976).

9. Normally, the action would be commenced by a specially endorsed writ pursuant to Rule 33 of the Ontario Rules of Practice R.R.O., 1970, Reg. 545 as am.

10. Rules of Practice, R.R.O., 1970, Reg. 545 as am.

11. Law Society of Upper Canada. Bar Admission Course, 1977-78: Civil Procedure 1 (Toronto: Law Society of Upper Canada, 1977), p. 119.

12. [1975] 6 O.R. (2d) 363.

13. Rules of Practice, R.R.O., 1970, Reg. 545, Rule 244.

14. Rules of Practice, R.R.O., 1970, Reg. 545, Rule 349.

15. R.S.C., 1970, c. E-10, as am.

16. 1890, 53 Vict. ch. 31(O.)

17. (1901), 2 O.L.R. 672.

18. Ibid., p. 675.

19. Montgomery v. Ryan (1908), 16 O.L.R. 75, at p. 97, p. 105.

20. Hannum v. McRae et al. 18 P.R. 185, 199.

21. Arthur W. Rogers, Falconbridge on Banking and Bills of Exchange, 7th ed. (Toronto: Canada Law Book Ltd., 1969), p. 28.

22. [1924] 1 K.B. 461.

23. Maurice Megrah and F.R. Ryder, Paget's Law of Banking, 8th ed. (London: Butterworths, 1972).

24. [1924] 1 K.B. 461, at p. 473.

25. R.S.C., 1970, c. C-34 as am.

26. Montgomery v. Ryan (1908) 16 O.L.R. 75.

27. (1890) 25 Q.B. 194.

28. Ibid., p. 198.

29. Ibid., p. 201-202.

30. (1918-19) 44 O.L.R. 235.

31. Ibid., p. 235.

32. Trustee of the Property of Long Shirt Co. Ltd., v. London Life Insurance Co. (1926-27) 31 O.W.N. 285 (S.C.), Doig et al. v. Hamphill [1942] O.W.N. 391 (S.C.).

33. (1926-27) 31 O.W.N. 285, at p. 286; See also the dicta in Re Toronto Rowing Club (1916) O.L.R. 23; and W.B. Williston and R.J. Rolls, The Law of Civil Procedure, vol. 21 (Toronto: Butterworths, 1970), p. 952-954 and cases cited therein.

34. [1970] 1 O.R. 466.

35. [1970] 1 O.R. 466, 67; [1970] 1 O.R. 39.

36. [1970] 1 O.R. 466.

37. [1973] 3 O.R. 422.

38. [1975] 6 O.R. (2d) 363.

39. Law Society of Upper Canada. Bar Admission Course, 1977-78: Civil Procedure 1 (Toronto: Law Society of Upper Canada, 1977) and [1975] 6 O.R. (2d) 363.

40. (42 and 43 Vict. C. I J) 12 Hal. st. (3rd) 848.

41. Maurice Megrah and F.R. Ryder, Paget's Law of Banking, 8th ed. (London: Butterworths, 1972), p. 167-168.

42. R.S.C., 1970, c. E-10, s.29(8).

43. Ibid.

44. Maurice Megrah and F.R. Ryder, Paget's Law of Banking, 8th ed. (London: Butterworths, 1972), pp. 167-170 and cases cited therein.

45. Waterhouse v. Barker (C.A.) [1924] 2 K.B. 759; South Staffordshire Tramways Company v. Ebkomith [1895] 2 Q.B. 669.

46. Maurice Megrah and F.R. Ryder, Paget's Law of Banking, 8th ed. (London: Butterworths, 1972), pp. 169-171 concerning the special problem of third parties bank records.

47. [1968] 1 O.R. 179.

48. Ibid., p. 180 and see generally James A. Fontana, The Law of Search Warrants in Canada (Toronto: Butterworths, 1974).

49. S.C. 1968-69, c. 14, s. 3(1).

50. R.S.O., 1970, c.151, s.34(1) as am.

51. [1965] 1 O.R. 481; see Ship v. R., 95 C.C.C. 143, at p. 155 for circumstances justifying a special order.

52. [1924] 1 K.B. 461.

53. (1957) 22 W.W.R. 49.

54 Ibid., p. 49 (headnote).

55. Ibid., and see decision of Davey, J.A. at p. 55.

56. R.S.O., 1970, c. 96.

57. R.S.O., 1970, c. 254.

58. R.S.O., 1970, c. 96.

59. Waterhouse v. Bankes [1924] 2 K.B. 759.

60. Ontario Law Reform Commission, Report on the Law of Evidence (Ministry of the Attorney General, 1976), see Chapter 11, concerning this problem of recollection and recorded notes.

61. Ibid., p. 180.

62. [1970] S.C.R. 608.

63. Ibid., see footnote 60 at p. 181. There are diverse views of the exact scope of Ares v. Venner but it is interesting to note that Manitoba, the province from which the appeal arose does not have a section of the Evidence Act comparable to R.S.O. 1970, c. 151, s. 36 as am.

64. Thomas v. Watkins Products Inc. (1966) 51 M.P.R. 321 (N.B.C.A.) and Setak Computer Services Corporation Limited v. Burroughs Business Machines Ltd. et al., 15 O.R. (2d) 750, p. 755.

65. Setak Computer Services Corporation Limited v. Burroughs Business Machines Ltd. et al, 15 O.R. (2d) 750, Aynsley et al v. Toronto General Hospital [1968] 1 O.R. 425; Northern Wood Preservers Ltd. v. Hall Corp. (Shipping) 1969 Ltd. et al [1972] 3 O.R. 751; Mack Maritimes Ltd. v. Nice, 19 N.B.R. (2d) 311.

66. Rupert Cross, Evidence 4th ed. (London: Butterworths, 1974), p. 14 and J. Sopinka and S.N. Lederman, The Law of Evidence in Civil Cases (Toronto: Butterworths, 1974), p. 278.

67. See R.S.C., 1970, c. E-10, s. 30(2) for a duplicate provision. See also R.S.O., 1970, c. 151, s. 55 and Notice to Admit Documents, Rule 817 and Form 42.

68. Patsy Abelle, "Evidentiary Problems Relevant to Cheques and Computers," 5 Rutgers Journal of Computers and Law (1976), p. 328, footnote 6, pp. 264-265; Pelrine v. Arron (1969) 3 D.L.R. (3d) 713 (N.S.C.A.). Vaughan C. Ball, McCormick's Handbook of the Law of Evidence, 2nd ed. (St. Paul: West Publishing, 1972), pp. 237-239.

69. Hanum v. MacRae et al, 18 P.R. 185 (Ont.C.A.) Emmott v. The Star Newspaper Company, 1892, 62 L.J.Q.B.

70. 1970 C.T.C. 224.

71. Edward Greenspan and Clay M. Powell, Criminal Law Audio Series, Aug. 1974, Side I.

72. (1977) 35 C.C.C. (2d) 266.

73. R.R.O., 1970, Reg. 801 as am. O. Regs. 401/72; 72/77.

74. Patsy Abelle, "Evidentiary Problems Relevant to Cheques and Computers," 5 Rutgers Journal of Computers and Law (1976), p. 342.

75. Ibid. This is a partial list of steps of the Standford Research Institute's Report, as in Abelle's article.

76. Ibid., p. 74.

77. Raymond v. Judge Frederick, 40 C.R.N.S. 112.

78. Colin Tapper, Computers and the Law (London: Weidenfeld and Nicolson, 1973), ch. 2.

79. Ontario Law Reform Commission, Report on the Law of Evidence (Ministry of the Attorney General, 1976) p. 188.

80. J.H. Buzzard, R. May and M.N. Howard, Phipson on Evidence (London: Sweet and Maxwell, 1976) par. 2210 et seq. See Appendix A for the text of the relevant section.

81. Ibid., par. 2214. See Appendix A for text of s.5.

82. Ibid., s. 5(3).

82A. See Appendix B

82B. A copy of this bill is to be found in Appendix C. Note subsequent to Riegle's Senate bill. Rep. Annunzio introduced

an EFT bill in the House of Representatives. The bill contains provisions similar to those in Riegle's bill. A copy is included in Appendix D. On the point of documentation of EFT transactions in particular see § 905.

83. Patsy Abelle, "Evidentiary Problems Relevant to Cheques and Computers," 5 Rutgers Journal of Computers and Law (1976), p. 358.

84. R. v. Bland (1974) 20 C.C.C. (2d) 332
R. v. King (1977) 35 C.C.C (2d) 424 see also (1977) 33 C.C.C. (2d) 411.

85. (1977) 17 O.R. (2d) 526.

86. (1897) 17 P.R. Ont. 492, at p. 494.

87. See University of Pennsylvania, "A Reconsideration of the Admissibility of Computer-Generated Evidence," (Dec. 1977). See also, James A. Sproul, "Evaluating the Credibility of Computer-Generated Evidence," Computer Law Service, Art. F, p. 203-224.

88. (1975) 11 O.R. (2d) 175.

89. Ibid., p. 176.

89A. Subsequent to the preparation of this paper Linden J. of the High Court held in oral reasons that "records" included computer records and that printouts were copies of a record kept by a financial institution within the meaning of s. 29 of the Canada Evidence Act. See R.V. McMullen Toronto Weekly Court June 21, 1978 (unreported).

90. King v. Mississippi ex rel. Murdock Acceptance Corp. 222 S.O. 393 (1969) as set out in Colin Tapper, Computers and the Law (London): Weidenfeld and Nicolson, 1973, pp. 21-22.

91. (1977) 33 C.C.C. (2d) 411.

92. Setak Computer Services Corporation Limited v. Burroughs Business Machines Ltd. et al., 15 O.R. (2d) 750 at p. 755. Griffiths J., held personal knowledge is a condition of admissibility.

93. Stanley A. Schiff, ed., Evidence in the Litigation Process: A Coursebook in Law (Toronto: University of Toronto, 1974), p. 392.

94. *See, e.g.*, United States v. De Georgia, 420 F.2d 889 (9th Cir. 1969) (government's foundation merely indicated that auto rental company relied upon its computer system and otherwise no specific foundation on the system's accuracy was presented); Merrick v. United States Rubber Co., 7 Ariz. App. 433, 440 P.2d 314 (1968) (foundation presented by a company credit manager who had "no personal knowledge of the actual physical operation of the plaintiff's IBM accounting [EAM] equipment" was held to be sufficient); City of Seattle v. Heath, 10 Wash. App. 949, 520 P.2d 1392 (1974) (foundation by custodian of a printout held sufficient although no foundation supporting the accuracy of the underlying data processing system was presented. *Cf.* Perma Research & Development v. Singer Co., 542 F.2d 111 (2d Cir.), *cert. denied*, 429 U.S. 987 (1976) (computed-generated evidence of the performance of an unproduced automotive part held admissible in support of a $7 million damage award although the proponent's programming procedures were not disclosed on "work product" grounds); United States v. Fendley, 522 F.2d 181 (5th Cir. 1975) (insurance company printout admitted on procedural grounds despite the government's failure to "completely lay a proper foundation"). *See also*, Bobbie Brooks, Inc. v. Hyatt, 195 Neb. 596, 239 N.W.2d 782, 784 (1976) foundation testimony was incorrect as a matter of generally accepted auditing standards); Matthews Estate, 47 Pa. D. & C.2d 529, 534-5 (Orphans' Ct. 1969) (foundation testimony was misleading in stating that it was "physically impossible" to alter or eliminate a magnetic tape record).

95. See: United States v. Russo, 480 F.2d 1228 (6th Cir. 1973); D. & H. Auto Parts, Inc. v. Ford Marketing Corp., 57 F.R.D. 548 (E.D.N.Y. 1973); People v. Gauer, 7 Ill. App. 512, 288 N.E.2d 24 (1974); King v. Murdock Acceptance Corp., 222 So. 2d 393 (Miss. 1969); Union Elec. Co. v. Mansion House Center N. Redev. Co., 494 S.W.2d 309 (Mo. 1973); Transport Indem. Co. v. Seib, 178 Neb. 253, 132 N.W.2d 871 (1965); State v. McGee, 131 N.J. Super. 292, 329 A.2d 581 (App. Div. 1974); State v. Vogt, 130 N.J. Super. 465, 327 A.2d 672 (App. Div. 1974); State v. Hibbs, 123 N.J. Super. 152, 301 A.2d 789 (Mercer County Ct. 1972), *aff'd*, 123 N.J. Super. 124, 301 A.2d 775 (App. Div. 1972); State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973); Railroad Comm'n v. Southern Pac. Co., 468 S.W.2d 125 (Tex. Civ. App. 1971). *Cf.* United States v. Greenlee, 380 F. Supp. 652 (E.D. Pa. 1974), *aff'd*, 517 F.2d 899 (3d Cir. 1975), *cert. denied*, 423 U.S. 985 (1975) (federal government records); Ed Guth Realty, Inc. v. Gingold, 34 N.Y.2d 440, 358 N.Y.S.2d 367, 315 N.E.2d 441 (1974) (state tax records admitted under business records statute).

96. On the subject of computer errors generally see, Reconsideration of the Admissibility of Computer-Generated Evidence, pp. 439-446.

97. See partial transcript of foundation evidence in Seib as reproduced in Perry, "Computer Records as Evidence of Insurance Premiums Due," Computer Law Service, Art. 5, pp. 1-7. See also Colin Tapper, Computers and the Law (London): Weidenfeld and Nicolson, 1973), p. 24.

98. Setak Computer Services Corporation Limited v. Burroughs Business Machines Ltd. et al, 15 O.R. (2d) 750 at p. 758 and p. 759.

99. Edward Greenspan and Clay M. Powell, Criminal Law Audio Series, Aug. 1974, Side I.

100. An instance of this was reported in the New York Times of December 14, 1965, as follows:

> "New Job Panel Tracks Down a Biased Computer
>
> Finds Hiring Prejudice was Fed to 'Objective' Device
>
> By John Herbers
> Special to The New York Times
>
> Washington Dec.13-
>
> The computer used in a large Southern manufacturing plant to screen job applicants seemed to sparkle with objectivity.
>
> Company officials pointed to its cards and tapes, its whirring mechanisms, its electronic circuits as proof that the subjective judgments of the personnel office had been by-passed.
>
> A team of investigators from Washington uncovered the truth: The computer was racially prejudiced. It has never accepted a Negro.
>
> The problem, of course, was that whoever had programed the computer had built into it, perhaps unconsciously, his own racial bias concerning people acceptable to the company.
>
> Company officials agreed to reprogram the computer with new standards and it is now accepting Negroes when they qualify for the job.
>
> This is one of about two dozen complaints that have been successfully conciliated by the Equal Employment Opportunity Commission in almost six months of operation."

101. [1974] 5 O.R. (2d) 356.

102. [1976] 17 O.R. (2d) 328.

103. Setak Computer Services Corporation Limited v. Burroughs Business Machines Ltd., et al, 15 O.R. (2d) 750, Aynsley et al v. Toronto General Hospital [1968] 1 O.R. 425; Northern Wood Preservers Ltd. v. Hall Corp. (Shipping) 1969 Ltd. et al. [1972] 3 O.R. 751; Mack Maritimes Ltd. v. Nice, 19 N.B.R. (2d) 311.

104. Ibid., p. 761.

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